No. 11-1898

In the

United States Court of Appeals

for the

Eighth Circuit

Tom Brady, *et al.*,

Plaintiffs-Appellees,

vs.

National Football League, *et al.*,

Defendants-Appellants.

APPELLANTS'
EMERGENCY MOTION FOR A STAY PENDING APPEAL AND EXPEDITED APPEAL AND A TEMPORARY STAY PENDING DECISION ON THIS MOTION

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INTRODUCTION

On April 25, 2011, the United States District Court for the District of Minnesota (the Honorable Susan Richard Nelson) enjoined the NFL member clubs from exercising their federal labor law right to lock out their player-employees. Pursuant to Federal Rules of Appellate Procedure 8 and 2, respectively, Appellants ("NFL") respectfully request a stay of that Order pending appeal and an expedited appeal. Pursuant to 8th Circuit Rule 27A(b)(4), the NFL also requests a temporary stay of the Order pending the Court's consideration of this Motion.

At least three legal doctrines bar the district court's preliminary injunction: (a) the Norris-LaGuardia Act's prohibition of preliminary injunctions in cases involving or growing out of labor disputes; (b) the primary jurisdiction of the National Labor Relations Board ("NLRB"); and (c) the nonstatutory labor exemption to the antitrust laws as articulated by the Supreme Court in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

The District Court brushed aside all three legal obstacles with the simple rationale that the NFLPA's unilateral disclaimer changes everything and renders the labor laws irrelevant. Indeed, in its stay order, the District Court denied deciding any issue other than the validity of the disclaimer. That blinks reality and ignores the plain text of the Norris-LaGuardia Act, the primary jurisdiction of the NLRB to determine if the NFLPA's disclaimer was in fact valid, and the holding in

Brown that the nonstatutory labor exemption applies until the situation is "sufficiently distant in time and in circumstances" from the collective bargaining process. 518 U.S. at 250. The District Court's premise that once it determines that the union validly disclaimed, two jurisdictional obstacles and the nonstatutory labor exemption all disappear is deeply flawed as a matter of law. On any or all of these issues, this Court, on *de novo* review, is likely to reverse.

The balance of the equities also weighs heavily in favor of a stay. In addition to skewing irreparably the collective bargaining process, the preliminary injunction effectively requires the clubs to produce their collective product, thereby exposing them to a host of other potential antitrust claims—many already pled—by these very same plaintiffs. In contrast, the players suffer so little immediate and irreparable injury that they did not even seek a temporary restraining order. This Court should have the same opportunity that the District Court enjoyed to make its judgment before the status quo is altered, and a stay pending appeal provides precisely that opportunity. The prospect of treble damages ensures that any harm to the players will not be irreparable, but trebly compensated.

As expedition would minimize any consequences of a stay, the NFL respectfully proposes the following expedited schedule:

May 10, 2011	Appellants' Opening Brief
May 24, 2011	Appellees' Opening Brief
May 31, 2011	Appellants' Reply Brief
As soon as possible	Oral Argument

STATEMENT OF FACTS

From 1993 to March 11, 2011, the terms and conditions of player employment in the NFL were governed by a collective bargaining agreement ("CBA") and a parallel class action settlement ("SSA"). *See White v. NFL*, 585 F.3d 1129, 1133-34 (8th Cir. 2009). Except for provisions relating to the 2011 NFL Draft, the SSA and CBA expired at 11:59 pm on March 11, 2011. At that time, the NFL Clubs exercised their federal labor law right to lock out their player-employees, in support of the NFL's position in collective bargaining negotiations that had been ongoing since at least June of 2009.

While bargaining, the NFLPA actively sought and secured advance approval from its player-members to disclaim its collective bargaining role if the Union later found it tactically advantageous to do so. At 4:00 pm on March 11—before the CBA's expiration, and while the parties literally were still at the collective bargaining table—the NFLPA purported to disclaim, even as Union representatives remained at the table and its Executive Director stated publicly that the NFLPA would continue to bargain if the NFL made certain financial disclosures. (*See* Ex. 18.[1]) Later that afternoon, one prospective and nine current NFL players—all represented by the NFLPA's counsel—filed this putative class action alleging that

[1] All exhibits are attached to the accompanying Declaration of Benjamin C. Block.

both a lockout *and* other collective conduct of the League necessary for competitive balance and fan appeal, such as last season's free agency rules, violate the Sherman Act.

Countless statements of NFLPA representatives, as well as the *NFLPA Guide to the Lockout*, prepared by the NFLPA for its members, confirm that the players are not *permanently* abandoning collective bargaining, but instead are *temporarily* disclaiming the NFLPA's union status in hopes of increasing their bargaining leverage through antitrust suits orchestrated by the NFLPA. (*See* Exs. 6-12.) For example, Derrick Mason, an NFLPA player representative, stated: "Still we stand behind DeMaurice [Smith, Executive Director of the Union] … . So are we a union? Per se, no. But we're still going to act as if we are one. We're going to still talk amongst each other and we're going to still try to as a whole get a deal done." (Ex. 8 at 6.) The President of the NFLPA referred to the "union strategy" of decertification as the "ace in our sleeve." (Ex. 6 at 10, 11). And plaintiff Mike Vrabel, a member of the NFLPA executive committee, stated *post*-disclaimer that NFL owners needed to negotiate directly with that committee. (Ex. 11 at 1.)

As the District Court recognized, this is not the first time the NFLPA has tried this tactic. The last time that a CBA between the NFLPA and the NFL expired was in 1987. Then, as now, the NFLPA directed and financed antitrust litigation by players against the League, *see, e.g.*, *Powell v. NFL*, 930 F.2d 1293

(8th Cir. 1989), and purported to disclaim its role in collective bargaining in hopes of defeating the nonstatutory labor exemption to the antitrust laws. In doing so then, the NFLPA repeatedly and unambiguously represented to the court that its disclaimer was "*permanent* and *irreversible*," (*see* Exs. 3-5), but it "resurrected" itself as a union after negotiating a preliminary settlement of the antitrust litigation, *see White v. NFL*, 822 F. Supp. 1389, 1396-97 (D. Minn. 1993), and imported the settlement terms into a new CBA.

In light of the mountain of evidence demonstrating that the NFLPA had long been planning a second tactical, bad-faith disclaimer, the NFL filed a charge with the NLRB on February 14, 2011, asserting that the NFLPA had violated its obligation to bargain in good faith pursuant to the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(3). (Ex. 13.) On March 11, 2011, the NFL amended its charge to assert that the Union's purported "disclaimer" is invalid because it violates the NLRA. (Ex. 14.) Proceedings before the Board are ongoing.

On April 25, the District Court entered a preliminary injunction, enjoining the clubs from maintaining the lockout. Appellants immediately filed a notice of appeal and moved for a stay pending appeal. On April 27, the District Court denied the NFL's request for a stay (Ex. 2), determining, in its view, that the NFL did not satisfy the relevant stay factors, noting that it did not know if an appeal would be expedited by this Court in time to prevent a "lost season." (*Id.* at 8 n.3, 20.)

STANDARD OF REVIEW

This Court considers four factors in determining whether to grant a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). A stay is granted when the appeal presents "serious" legal issues and the balance of equities favors the stay applicant. *See James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir. 1982).

ARGUMENT

I. The NFL is Likely to Succeed on Its Appeal.

A. The District Court lacked jurisdiction to enjoin the lockout.

The NFLPA is not the first entity to appreciate the possibility of converting labor disputes into antitrust suits. Congress responded with the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* Section 1 of the Act embraces a general policy disfavoring injunctions in cases "involving or growing out of labor disputes." 29 U.S.C. § 101. Section 4 is even more specific. It provides: "*No court* of the United States *shall have jurisdiction* to issue *any restraining order or temporary or permanent injunction* in any case involving or growing out of any labor dispute to prohibit any person or persons participating in such dispute … from doing any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment." 29 U.S.C. § 104(a) (emphasis added).

By locking out employees, an employer "refus[es] … to remain in [a] relation of employment." 29 U.S.C. § 104(a). Thus, by its plain terms, the Act bars injunctions against lockouts by employers just as it bars injunctions against strikes by employees.[2] Indeed, the courts have uniformly concluded that the Norris-LaGuardia Act bars injunctions against lockouts. *Chi. Midtown Milk Distribs., Inc. v. Dean Foods Co.*, 1970 WL 2761, at *1 (7th Cir. July 9, 1970); *Clune v. Publ'rs Ass'n*, 214 F. Supp. 520, 528-29 (S.D.N.Y. 1963), *aff'd*, 314 F.2d 343 (2d Cir. 1963) (per curiam); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298, 1311 (E.D. Wash. 1981). The only exception is the order promptly reversed by the Seventh Circuit in *Chicago Midtown Milk*. The order under review here should suffer the same fate.

The District Court emphasized that the Act was prompted by concerns about courts enjoining strikes and—despite the clear text and precedent—expressed some doubt that the Act prohibits injunctions against lockouts. Ultimately, however, the

[2] If more confirmation were needed that the Norris-LaGuardia Act applies to lockouts and strikes alike, the Labor Management Relations Act (LMRA) of 1947 provides it. The LMRA allows the President to enjoin "a threatened or actual strike or *lockout* affecting an entire industry or a substantial part thereof" if in his opinion it "imperil[s] the national health or safety." 29 U.S.C. § 176 (emphasis added). The Act expressly provides that the Norris-LaGuardia Act is not applicable to such Presidential actions. 29 U.S.C. § 178(b). By carving out a narrow category of injunctions against strikes *and lockouts*, the LMRA confirms that the Norris-LaGuardia Act generally applies to bar injunctions against "strikes and lockouts."

District Court rested its Norris-LaGuardia Act ruling on the notion that the NFLPA's disclaimer rendered the Act wholly inapplicable.

That reasoning cannot be squared with the plain text of the Act. Congress was familiar with the ingenuity of lawyers and courts in finding creative ways to invoke the injunctive power of the federal courts, and wrote the Act in purposefully broad terms to prevent this. By its terms, the Act covers disputes between employers and "*employees or* associations of employees," in "any case involving *or growing out of* any labor dispute." 29 U.S.C. § 113(a) (emphases added). Under this definition the Act applies whether or not there is a union. *See New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 559-61 (1938). Thus, the purported disclaimer by the NFLPA did not vest the District Court with jurisdiction that Congress has expressly withdrawn.

Remarkably, the District Court faulted the League for failing to identify "legal support for its attempt to place a *temporal* gloss" on the term "labor dispute." (Order 58.) But there is no need for a temporal gloss because the statute itself expressly addresses the temporal issue by using the term "or growing out of" a labor dispute, which itself squarely refutes any notion that the Act becomes inapplicable the minute a union disclaims. *See* 29 U.S.C. §§ 101, 104, 113(a).

Even if one were to indulge the rather fanciful notion that there is no longer a current labor dispute between the players and the League, there is no question but

that this case *grows out of* a labor dispute, and that is all that the Act requires. Plaintiffs filed this suit only hours before the CBA expired, and only minutes after the Union walked away from labor negotiations conducted under the auspices of the Federal Mediation and Conciliation Service; and plaintiffs seek relief concerning the terms and conditions of employment. The purported disclaimer does nothing to change the *origins* of this action. It self-evidently "grow[s] out of" a "labor dispute," and the Norris-LaGuardia Act deprived the District Court of jurisdiction to enter the injunction.[3]

B. The Order invades the primary jurisdiction of the NLRB.

Even apart from the Norris-LaGuardia Act, the District Court jumped the gun by invading the primary jurisdiction of the NLRB. Indeed, the District Court's remarkable detour into a prediction as to the likely outcome of a pending unfair labor practice charge before the Board (Order 34, 42) only underscores that the court embarked on inquiries within the Board's primary jurisdiction. The District Court's opinion for page after page "indicate[s] what the court believes is

[3] The District Court's conclusion that the Norris-LaGuardia Act was wholly inapplicable caused it to overlook entirely other obstacles to the relief entered. Even if a court were to find jurisdiction to enjoin a lockout despite the clear language of Sections 1 and 4, Section 7, 29 U.S.C. § 107, would still require an evidentiary hearing and findings that are wholly absent from the Order. Such hearing and findings are also jurisdictional. *See, e.g.*, *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 42 (8th Cir. 1946). Thus, once it is clear that the Act applies because this case grows out of a labor dispute, the Order cannot stand.

permitted by [NLRB] policy, prior to an expression by the [Board] of its view. *This is precisely what the doctrine of primary jurisdiction is designed to avoid*." *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 821 (1973) (emphasis added) (reversing district court's grant of injunctive relief) (plurality op.); *see also, e.g.*, *Newspaper Guild of Salem v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1283 (1st Cir. 1996).

The District Court viewed applicability of the primary jurisdiction doctrine as a matter entirely for its discretion. But this Court reviews the issue of primary jurisdiction *de novo*, *see United States v. Rice*, 605 F.3d 473, 475 (8th Cir. 2010), and in all events discretion can be abused. In fact, the Board's claim to primary jurisdiction is at its zenith in cases, like this one, that (i) involve a pending Board matter arising from the same labor dispute and affecting the same employers and employees, and that (ii) fall within the NLRB's expertise and involve at their core important labor-law questions—such as the validity of a purported disclaimer of representation—on which the courts would benefit from receiving the NLRB's expert determination.

As to the first point, the plaintiffs' case and the District Court's Order turn entirely on the validity of the NFLPA's disclaimer. (*See* Order 19, 25 n.15, 43-49, 59-61, 66-67, 83-87.)

As to the second point, the validity of the disclaimer is a predicate issue that falls squarely within the NLRB's primary, if not exclusive, jurisdiction.[4] The District Court recognized that the validity of the disclaimer was an "initial matter" that had to be resolved (Order 19), and that the National Labor Relations Act vests in the NLRB jurisdiction to decide whether a union's purported disclaimer is valid (Order 34-35). Yet, it inexplicably determined that the validity of the disclaimer presented a "collateral" issue that the District Court should decide for itself.

Under longstanding Board precedent, a union's disclaimer of interest is only effective if "unequivocal" and made "in good faith" and not as a "tactical maneuver." *See, e.g.*, *IBEW & Local 159 (Texlite, Inc.)*, 119 NLRB 1792, 1798-99 (1958), *enf'd* 266 F.2d 349 (5th Cir. 1959); *News-Press Publ'g Co.*, 145 NLRB 803, 804-05 (1964); *Retail Assocs., Inc.*, 120 NLRB 388, 394 (1958). The Board has the specialized expertise to investigate the evidence pertaining to the disclaimer to make this determination.

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[4] The validity of the NFLPA's purported disclaimer presents issues of representation under Section 7 of the NLRA because it determines whether the players are still represented by a union. It also presents issues of good faith bargaining under Section 8 because, if the disclaimer is invalid, it is a bad-faith bargaining tactic, as discussed below. These issues fall within the Board's exclusive jurisdiction. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *NLRB v. Columbia Tribune Publ'g Co.*, 495 F.2d 1385, 1389 (8th Cir. 1974).

For purposes of the applicability of the primary jurisdiction doctrine here, it should have sufficed that there was evidence that the disclaimer:

- *was not unequivocal*—even after the disclaimer purportedly went into effect, the NFLPA (i) said it would continue to bargain if certain disclosures were made, (ii) made public statements indicating that it still wants to bargain, and (iii) has continued to pursue grievances pertaining to League revenues and alleged collusion;

- *was not made in good faith*—statements of NFLPA executives and representatives post-disclaimer indicate that the NFLPA still wants to negotiate a "fair CBA" (Ex. 9 at 2) and terms and conditions of employment (*see* Ex. 11); and

- *was made for a "tactical" reason*—to seek to avoid or enjoin the League's exercise of its labor law right to lock out and to increase the players' leverage in negotiations.

Under the primary jurisdiction doctrine, the District Court should have stayed the motion pending the proceedings involving the NFL's unfair labor practice charge challenging the validity of the disclaimer.[5]

To make matters worse, the District Court relied primarily on a Board Division of Advice Memorandum (*see* Order 37-41), which is not binding Board precedent. *See, e.g.*, *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir.

[5] Leaving aside that the District Court intruded on the Board's jurisdiction by opining on the likely outcome of proceedings before it, if—as the District Court apparently believes—the NFL's unfair labor practice charge is without merit, then presumably the Board would decline to issue a complaint in short order. But if—as the League believes—there is probable cause that the disclaimer violates the NLRA, then a complaint will issue, and the Order creates the very real prospect of inconsistent results that the primary jurisdiction doctrine seeks to avoid.

2002); *USPS*, 345 NLRB 1203, 1214 n.17 (2005), *enf'd*, 254 Fed. Appx. 582 (9th Cir. 2007). Further compounding that error, the District Court misread that Memorandum to stand for the proposition that inconsistent conduct is the sole basis for rejecting a union's disclaimer when it actually states that unequivocality, good faith, *and* lack of inconsistent conduct are *separate* requirements: "[i]n order for a union's disclaimer … to be valid, it must be unequivocal, made in good faith, *and* unaccompanied by inconsistent conduct." *Pittsburgh Steelers, Inc.*, 1991 WL 144468, at *2 n.8 (NLRB G.C. June 26, 1991) (emphasis added).[6]

Finally, the District Court's reliance on its assessment of the history of the NFLPA and disclaimer overlooked the most important lesson from that history: When *this* union says it is no longer collectively bargaining, that does not mean it is so. We know today what the General Counsel and Judge Doty could not have known in 1991: An NFLPA disclaimer today does not mean that the Union will not be here tomorrow.

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[6] The District Court further erred in relying on the unreviewed, non-binding decision of Judge Doty in *McNeil v. NFL*, 764 F. Supp. 1351 (D. Minn. 1991), where Judge Doty determined that the NFLPA's decertification in 1989 ended the nonstatutory labor exemption. In doing so, Judge Doty recognized that his decision presented a "controlling question of law *on which there is substantial ground for difference of opinion*," *id.* at 1360 (emphasis added), which meets the standard for a stay.

C. The Order is barred by the nonstatutory labor exemption.

Even if the District Court had jurisdiction to issue an injunction, the injunction would still need to be reversed on the merits. Under *Brown* and *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), the antitrust challenge to the lockout is clearly precluded by the nonstatutory labor exemption *even if* the Union's disclaimer were construed to be valid.

In *Brown*, the Supreme Court ruled that a multiemployer agreement was immune from antitrust scrutiny because it "took place during and immediately after a collective-bargaining negotiation" and "grew out of, and was directly related to, the lawful operation of the bargaining process." 518 U.S. at 250. "[T]o permit antitrust liability" in such circumstances would "threaten[] to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires." *Id.* at 241-242.

The labor exemption thus applies until there has been "sufficient[] distan[ce] in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process." *Id.* at 250. While the Court did not need the NLRB's view to *apply* the exemption, it held that it would be inappropriate to find the exemption *inapplicable* "without the detailed views of the Board." *Id.*

Wherever a court, aided by the detailed views of the Board, might ultimately draw the line on the termination point of the nonstatutory labor exemption, the lockout *here* is clearly not "distant in time and circumstances from the collective bargaining process." 518 U.S. at 250. As for time, the NFLPA issued its disclaimer and the plaintiffs filed this suit *before* the previous CBA expired; the NFL then locked out the players hours later, *immediately* upon the CBA's expiration. Events that overlap in time, or follow in immediate succession, are hardly "distant."

As to circumstances, it is equally clear that the lockout, the disclaimer, and this lawsuit grew out of and were directly related to the collective bargaining process, and that each was designed to seek to bring leverage to bear on the negotiation of terms and conditions of employment of NFL players. Indeed, the District Court recognized the reality of the situation (Order 40-41) but then dismissed the logical implication of it by assuming that (a) the disclaimer was valid and (b) that it instantaneously ended the exemption. Neither point is correct in light of the Supreme Court's holding in *Brown*, 518 U.S. at 250, and under this Court's holding in *Powell*, 930 F.2d at 1303-04.

The District Court also incorrectly dismissed *Brown* as limited to the issue of impasse. But while *Brown* involved an impasse, its reasoning and holding were not limited to that context. *See* 518 U.S. at 243 (focusing on the exemption's "rationale").

Just as multiemployer bargaining could not function if the employer coordination necessarily inherent in it could be assailed as an antitrust violation immediately upon impasse, it could not function if the exemption disappears immediately upon the union's unilateral declaration of a disclaimer.[7] In both situations, the exemption continues not only because negotiations may resume, but also because the mere prospect of the exemption's abrupt termination would itself undermine and inhibit robust bargaining, favored by federal labor law and policy, by the multiemployer bargaining unit. *Brown* therefore provides a double protection against a premature conclusion that the exemption has expired: (1) the exemption continues until the collective bargaining process is distant in both time and in circumstances, and (2) courts should not find the exemption inapplicable without seeking the detailed views of the Board.

The decision below is also irreconcilable with *Powell*. In *Powell*, this Court held that "as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies." 930 F.2d at 1303-04. There is far more than a possibility of such proceedings here; an unfair labor practice charge is *already* pending before the Board to address the

[7]History shows that an NFLPA disclaimer may be just as "temporary" as impasse.

NFLPA's disclaimer. And there is no reason to think that the Board's views on the validity of disclaimer are any less important than its views on whether impasse has been reached; each inquiry requires the Board to apply its specialized expertise in assessing compliance with Section 8 of the NLRA.

Finally, the District Court clearly erred by concluding that the nonstatutory labor exemption does not protect the lockout as it concerns a tool and not "mandatory subjects of collective bargaining." (*See* Order 85-87.) The subject of the underlying labor dispute here concerns core mandatory subjects of collective bargaining—wages and salaries—and affects only the labor market, not competition in any product market. When an agreement has "no purpose or effect beyond the scope of the labor dispute" and "no anticompetitive effect unrelated to the collective bargaining negotiations," it is exempt from the antitrust laws. *Amalgamated Meat Cutters & Butchers Workmen of N. Am. v. Wetterau Foods, Inc.*, 597 F.2d 133, 135-36 (8th Cir. 1979).

Moreover, the Supreme Court has held that multiemployer lockouts are protected from antitrust scrutiny by the nonstatutory labor exemption: "Labor law permits employers, after impasse, to engage in considerable joint behavior, including *joint lockouts* . …" *Brown*, 518 U.S. at 245 (emphasis added); *see id.* at 247-48 (rejecting the position espoused by petitioners that the exemption should apply to "terms" but not "tactics").

II. The Balance of The Equities Weighs In Favor of a Stay.

Absent a stay, the NFL would suffer irreparable harm, even during the relatively short period necessary for this case to be considered on appeal. To begin, the preliminary injunction deprives the NFL of its labor law right to impose a work stoppage. *See, e.g.*, *NLRB v. Ins. Agents' Union*, 361 U.S. 477, 497 (1960); *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 846 (8th Cir. 1973). As the very existence of the Norris-LaGuardia Act reflects, enjoining the use of economic weapons like lockouts and strikes irreparably alters the balance of economic power in the bargaining process and irreparably harms the enjoined party. Indeed, the facts that Congress prohibited temporary injunctions altogether in circumstances like this and explicitly provided for expedited appellate review of any injunctive orders, provide strong evidence that it understood the serious and irreparable harm that such orders may cause. *See* 29 U.S.C. §§ 104, 107, 110.

In short, absent a stay, it will be impossible to restore the parties to their respective positions as of April 25, 2011 if this Court determines that the District Court's Order was in error. Nor would it be possible to unscramble the egg in terms of player transactions (trades, signings, cuts) that would occur in the interim. As a member of the NFLPA executive committee aptly put it, "If the lockout is lifted and the stay isn't granted, it could be utter chaos." (Ex. 19.)

The harm is particularly acute in the unique context here, where the injunction forces the NFL member clubs to engage in conduct that plaintiffs contend also violates the antitrust laws. The injunction effectively requires the clubs to produce their inherently joint and collective product, which in turn inevitably requires clubs to reach agreements concerning numerous terms and conditions of player employment. "The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions." *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2216 (2010); *see also Brown*, 518 U.S. at 248-49; *Reynolds v. NFL*, 584 F.2d 280, 287 (8th Cir. 1978).

But under plaintiffs' theory, such decisions expose the member clubs to treble-damage antitrust claims by players contending that they unreasonably restrain competition in a purported market for player services. Indeed, Plaintiffs' complaint purports to challenge *all* "restrictions on player free agency." (Compl. ¶¶125-136.) A stay is accordingly necessary to ensure that the NFL does not face the Catch-22 created by the Order wherein the League faces potential antitrust liability no matter what course it takes. *See Brown*, 518 U.S. at 241-42.

Against all this obvious irreparable harm to the League, the District Court repeatedly emphasized that players' careers are short. But those concerns have

little relevance to the interval of time implicated by this stay request. All that is relevant here is the injury, if any, that the plaintiffs would suffer in the time necessary for this Court to consider a highly expedited appeal during the offseason.

The plaintiffs did not even seek a temporary restraining order to prevent any short-term harm. And for good reason: It is the NFL offseason; no games or training camps are scheduled for several months; no player will suffer competitive harm because no competition is scheduled. A stay pending appeal would give this Court the same opportunity to decide this case while maintaining the status quo ante that the District Court enjoyed by virtue of the absence of a TRO request.

In the end, the balance of the equities is not close. The NFL bears the financial risk of its actions, while the players, if they ultimately prevail, would secure the bonus of treble damages. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Rittmiller v. Blex Oil, Inc.*, 624 F.2d 857, 861 n.4 (8th Cir. 1980). And even if both sides faced irreparable harm during the pendency of an appeal, that would only underscore the strong public interest in encouraging parties in a labor dispute to resolve their differences free from the skewing effect of an injunction.

CONCLUSION

This Court should stay the District Court's Order pending appeal, and expedite Defendants' appeal under the schedule proposed above. The Court should also stay temporarily the Order pending its consideration of this Motion.

Respectfully submitted,

/s/Paul D. Clement

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Counsel for Appellants

April 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2011, I electronically filed the foregoing, along with the accompanying Declaration of Benjamin C. Block (with exhibits), with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and that I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first-class, postage paid, to the address listed on the Court's CM/ECF system.

s/Benjamin C. Block
Counsel for Appellants